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Supreme Court of the United States.

OCTOBER TERM, 1945.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

THOMAS C. O'BRIEN,
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BOSTON AND MAINE RAILROAD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Helene A. Jesionowski, as she is administratrix of the estate of Stanley S. Jesionowski, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above case on April 1, 1946, reversing a judgment for $20,000 entered in the District Court of the United States for the District of Massachusetts upon a jury verdict.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 119) was filed April 1, 1946; petitioner's motion to stay the mandate was allowed April 3, 1946. The opinion is not yet reported.

Jurisdiction.

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

This was an action under the Federal Employers' Liability Act brought by the petitioner, Helene A. Jesionowski, Administratrix, to recover compensation for herself and minor children because of the death of her husband, a railroad brakeman, resulting from the derailment of certain freight cars (R. 1, 2). The trial judge in the District Court permitted the jury to apply the doctrine of *res ipsa loquitur* on the question of the railroad's negligence, provided the jury, upon the evidence, first exonerated the deceased from fault (R. 106). This the jury did by its verdict. The Circuit Court of Appeals held that the doctrine of *res ipsa loquitur* was not applicable upon the record. The questions presented are (1) the correctness of the interpretation by the Circuit Court of Appeals of the doctrine of *res ipsa loquitur,* (2) the applicability of that doctrine to the facts which the jury were warranted in finding upon the record, and (3) the question whether or not the defendant, merely by pleading and introducing evidence in an attempt to prove that the acts of the deceased himself were the sole cause of his injury, thereby deprived the plaintiff of her right to rely upon the doctrine of *res ipsa loquitur,* even though the jury, under explicit and clear instructions (R. 106), found that the deceased was without fault.

Statement.

The case was submitted to the jury on a count for general negligence. The defendant's answer set up not only

contributory negligence, referred to in the opinion of the Circuit Court of Appeals (R. 121), but also "that the plaintiff's intestate was guilty of negligence which was the sole proximate cause of his injuries and death" (R. 3, 4). The opinion does not refer to this part of the defendant's answer, although the proof offered was intended to support sole causation rather than contributory negligence, as will appear.

At about 5.30 a.m. July 1, 1944, Stanley S. Jesionowski, the plaintiff's intestate, age thirty-two years, was killed as the result of a derailment of certain freight cars, moving in interstate commerce, during a movement in which he participated as brakeman (R. 10-15). The movement was to detach four cars from a string of forty-nine cars on a main track, pull ahead past a switch leading into a siding (Point B on plan attached to record), and then back the four cars into the siding over the switch points at B and past a frog 75½ feet beyond B. A derailment occurred somewhere between the switch point B and the frog, both inclusive. The sole witness called by the plaintiff was one Whitney, defendant's locomotive engineer, who was the only person observing, or having opportunity to observe, Jesionowski's conduct just prior to the accident. The jury could have found from Whitney's testimony that Jesionowski cut the first four cars next to the engine from the train and then signaled the engineer to pull ahead on the main track (R. 11); that Jesionowski then got on the side of the fourth car and rode ahead; that he got off the side of the car and went sideways at right angles to the track toward the switch (Point B on plan, and R. 11, 12); that when Jesionowski was operating the switch the engineer's view of him was obstructed by intervening objects (R. 12); that Jesionowski came back into view and gave a back-up motion; that the engineer then started his back-up movement; that after Jesionowski got back on the fourth or

lead car he continued to give a back-up motion (R. 12, 13); that then the engineer saw planks and splinters going into the air; that when he went back he saw these "planks or splinters" "between the rails" "under the car there somewheres" (R. 13, 18); that immediately after the derailment he observed that the switch was properly set for the siding into which he was backing; that about 75 or 80 feet beyond the switch there was a frog (R. 21) over which the four-car cut had to pass in taking the siding (R. 18, 19); that it was a spring frog operated by the flanges of the car wheels as they hit it; that if the frog does not open when touched by the wheel flange, "probably a derailment would occur" (R. 19, 20); that he saw the planks and splinters flying first and he did not know there was a derailment until after he stopped (that is after he had gone about three car lengths, or about 135 feet, which would be beyond the frog—R. 13, 14); that Jesionowski's body was found, after the train had stopped, under the trucks of the third car, which was next to the lead car as they were backing up (that is, about 95 feet from the switch); that the train was going only 5 miles per hour.

On cross-examination of this witness defendant's counsel undertook to lay a foundation to support a theory that Jesionowski had thrown the switch while the fourth car was astride the switch points, as basis for an argument that Jesionowski's own act was the sole cause of his death. This was done by trying to show by the engineer that the front or nose of his engine stopped its forward movement precisely at point A on the plan and then by undertaking to establish precisely the length of the train. If the starting point of the calculation, (A), and length of train was 15 feet in error, one way or the other, the theory became mathematically impossible. However, the engineer testified that the stopping point was "about" at point A and that the length of the train was "about" 246 feet. He

testified that he had made no measurements, and that he made no pretension of being accurate (R. 22, 29-32). Therefore, at the end of the plaintiff's case the jury would have been amply warranted in finding that the evidence did not demonstrate that the fourth car was astride the switch point when Jesionowski threw the switch. The defendant did not strengthen its position as to this theory by the testimony of other witnesses introduced in the defendant's case.

Specifications of Errors to be Heard.

It is submitted that the Circuit Court of Appeals erred—

1. In making the following ruling:

> "It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur*. This was error. The possible causal actions leading up to the fatal accident cannot be so separated."

2. In making the following ruling:

> "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the

switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back."

3. In making the following ruling:

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur*."

Reasons for Granting the Writ.

1. The record shows an appropriate case for the application of the doctrine of *res ipsa loquitur*.

2. The jury was warranted in reaching its verdict if the doctrine is applicable.

3. There is serious conflict of authority in both federal and state courts as to the nature and scope of the doctrine, and as to its applicability. This court has made no exposi-

tion of that doctrine, or of rules of applicability, since the decision in *San Juan Light Company* v. *Requena*, 224 U.S. 89, and there is serious need for directive guidance by this court for the protection of bench, bar and parties.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
By her Attorneys,
THOMAS C. O'BRIEN,
J. EDWARD KEEFE, JR.

Supreme Court of the United States.

OCTOBER TERM, 1945.

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BOSTON AND MAINE RAILROAD.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals is not yet reported. It is printed in full on pages 119 to 124, inclusive, of the record accompanying this petition.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 1, 1946. Petitioner's motion to stay the mandate was allowed April 3, 1946. This is a petition for the issuance by the Supreme Court of the United States of a writ of certiorari under the authority of section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Case.

The framework of facts and the errors assigned have been briefly stated in the petition and are integrated into this brief by reference. A principal error on the part of the Circuit Court of Appeals, aside from an incorrect statement of the nature and scope of the doctrine of *res ipsa loquitur*, lies in the ruling of the appellate court denying plaintiff the benefit of that doctrine. This issue, which the plaintiff contends was erroneously resolved by the court, necessitates a fuller statement of material facts and evidence than the statement set forth in the petition; especially as to points of compass, the movements of the train, the instrumentalities within the defendant's control which might have caused the fatal derailment, and the conduct of the plaintiff's decedent.

The Points of Compass and the Plan.

A stranger to the established habit of residents of New England, and particularly of railroad men, of referring to Maine as "down East" would not understand the designations of "east" and "west," used consistently by all the witnesses; for the map of New England shows that Portland is about north by northeast of Boston. It will clarify the record if, at the outset, it is firmly fixed in the mind that Portland is "east" of Boston and the train movement under scrutiny began from the "east" (Portland) to the "west" (Boston).

Defendant's Exhibit No. 1, the plan (R. 111), must be understood as showing two main tracks, the lower or north main track being used for westbound traffic, and the upper or south main track being used for eastbound traffic. The siding where the accident occurred is referred to in the testimony as the "north" siding and begins at the switch

points opposite the switch "B" and runs "east." It is the siding next to the "vacant building" and next to the General Electric Company works referred to in the testimony. The "frog" referred to in the record is 75½ feet (R. 40) east of "B" at a point where the north rail of the westbound main track is intersected by the south rail of the north siding. It is not marked on the plan but is clearly identifiable through the testimony.

The Train Movement.

The freight train involved in the accident had come from the "east" (Portland), passed a mile or so beyond West Lynn, *en route* to Boston, and stopped at some point east of switch "B." The next movement was to cut off the engine and the first four cars from the forty-nine car freight train, to pull ahead toward Boston until the fourth car cleared the switch "B," to throw the switch for the north siding, and to back the four cars into the north siding and leave them there. It was during this backing movement that the derailment occurred.

The Instrumentalities Involved.

The instrumentalities, as shown by the testimony, were the engine and cars, the tracks, the roadbed, the switch, switch points, and connecting mechanism, at "B," the flanges of the wheels, the spring frog, and planks between the rails. We do not include in the above list as part of the "thing" which caused the injury "the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train," all of which are included by the Circuit Court of Appeals in its definition of "thing" as that word appears in the classic doctrine of *res ipsa loquitur*.

THE CONDUCT OF DECEASED.

As to this, the jury warrantably found Jesionowski guiltless of negligence; therefore, there being no explanation as to how the derailment occurred, the derailment itself, and the circumstances accompanying it, permitted the application of *res ipsa loquitur*.

Other facts and evidence will be referred to when needed in the discussion of the several specifications of error.

Errors Specified.

There are three specifications of error in the petition. The brief will attempt to deal with them separately, but this treatment cannot be precisely carried out; errors, which are set out by way of quotations from the opinion of the Circuit Court, intermingle with each other.

THE FIRST SPECIFICATION OF ERROR (R. 122).

The quotation from the opinion attacked under this heading does not include a short paragraph immediately preceding the specification. This paragraph reads (R. 122): "The court instructed the jury fully as to the doctrine of res ipsa loquitur, and this is claimed by appellant as reversible error." However, neither party took exception to the whole or a smallest part of the charge. It is submitted that the doctrine as given to the jury became the law of the case. Nevertheless, erroneously, the Circuit Court not only denied the applicability of the doctrine, but proceeded to enunciate its own doctrine. The Circuit Court had no right to substitute its own conception of the rule for the law given to the jury, because the defendant did not take exception to the statement of rule of *res ipsa* as it was stated to the jury. Yet it did so. And the appellate court

substituted a false concept of the rule for the correct statement of the trial judge.

Those portions of the judge's charge referred to in the several specifications of error are as follows:

> "Whatever factual questions are to be decided in the case are for you" (R. 98).
>
> "The defendant in its answer denies it was negligent and contends the accident was caused by the sole negligence of the plaintiff's decedent" (R. 100).

The judge proceeded to define *res ipsa loquitur*, quoting from the classic cases, *Sweeney* v. *Erving*, 228 U.S. 233 (1913), and *San Juan Light Co.* v. *Requena*, 224 U.S. 89 (1912) (R. 100, 101).

> "Now, what I have said does not mean that you are bound to find negligence on the part of the facts here, it means that an accident of such a nature, while the real cause remains undiscovered, is reasonable evidence for your consideration in determining whether the accident arose from the defendant's negligence" (R. 102).
>
> "The defendant here does offer an explanation and it takes the position and contends that the evidence supports it, that the accident here was not only not due to any negligence on its part but contends that there was a cause for this accident other than its own negligence. It contends, as I understand its position, that the improper handling of the switch by the deceased caused the accident and the deceased had control of that instrumentality at the time of the accident and his own negligent handling of the switch was the sole cause of the accident. Of course, if the deceased's negligence was the sole cause of the accident the plain-

tiff here cannot recover. And since there can be no application of the doctrine of res ipsa loquitur if other causes than the negligence of the defendant, its agents or servants, *might* have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by fair preponderance of the evidence before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control —one of the prerequisites to the application of the rule here invoked" (R. 103).

"Thus, you, the jury, will have to determine whether the deceased himself with the control he actually exercised over the switch *might* have been the cause of the accident. If he caused the accident, if he *might* have caused the accident by his control of that switch, you would not be justified in applying the rule of res ipsa loquitur. On the other hand, if no measure of control that he exercised over the switch might have been the cause of the accident, then the plaintiff has sustained her burden of excluding in this case all causes other than the negligence of the defendant, the cause of the accident would remain undiscovered and you would be justified in applying the rule" (*res ipsa loquitur*) (R. 103, 104).

"Now, there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars and in order for you to decide who caused the accident you will be compelled to determine two facts, (1) Did he throw the switch properly, and (2) Did he throw it at the proper time? *I do not understand there is any dispute between the parties that he threw the switch in a proper mechanical*

manner, but there is a marked dispute as to the point or time at which he threw it" (R. 104).

"If the deceased threw the switch after all the cars had passed to the west of the switch point toward Boston—the deceased exercised no further control over the switch and if the switch caused the accident the deceased could not have been said to have been a cause. In determining this issue—as to the deceased being the sole cause of the accident through his own negligence—take into consideration his age and experience as a brakeman. If he did what the defendant says he did, it was an unusual thing to do and you would have a right to consider his experience in handling switches in determining whether or not he actually threw the switch before all the cars passed over it" (R. 105, 106).

That part of the opinion of the Circuit Court which the petitioner has designated as her first specification of error reads:

"It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of rés ipsa loquitur does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of res ipsa loquitur. This was error.

The possible causal actions leading up to the fatal accident cannot be so separated."

The appellate court does not cite a single authority in support of this ruling.

Before attempting to analyze, if possible, just what the ruling means, we should point out a fatal error of fact in the opinion. The ruling *assumes* that the switch was the only res "involved in the damaging accident." There is much more testimony in the record relating to planks and the frog as possible causes of the derailment than testimony relating to the switch. And this plank-and-frog evidence seems to counsel to point strongly to derailment *after* the fourth or lead car had passed the switch points safely. It must be conceded, on the record, that Jesionowski had not the slightest control of these other instrumentalities. (The contention of the plaintiff on this point will be discussed later under the heading "The switch points, the planks, and the frog.")

We first discuss the ruling up to and including the words "This was error," leaving the last sentence of the ruling to be dealt with as a statement of the reason for the ruling.

The ruling seems to mean one thing and one only, *i.e.*, that, the trial judge having submitted the question of the guilt or innocence of the deceased to the jury, the doctrine of *res ipsa loquitur* could never thereafter be used by the jury. This seems to counsel an astounding proposition, utterly unsupported by the statement of the rule as it appears in the case of *San Juan Light Co.* v. *Requena*, or by any bench authority, or by logic or reason. Indeed, this offensive ruling clearly violates the definition of *res ipsa* as stated in the San Juan case, which is, in part: "When a thing causes injury, *without fault of the injured person*," etc. Now it is clear that the burden is on a plaintiff to

exonerate himself from all blame. He must be utterly guiltless. It is one of the imperative *conditions precedent* to his right to use the rule of *res ipsa*. Plainly this is a question of fact for the jury. The trial judge may not rule upon it as matter of law unless the evidence as to the plaintiff's innocence is so slight that it must be said to fall short of the liberal rule of withdrawability established recently by this court in Employers' Liability cases: *Bailey* v. *Central Vermont Ry., Inc.*, 319 U.S. 350; *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29.

The jury found the defendant guiltless.

It is not easy to find authorities one way or the other as to whether or not the question of a plaintiff's freedom from fault, as those words are used in the statement of the *res ipsa* rule, is a question of fact for the jury. Obviously it is a question of negligence, and such a question is for the jury. The following cases directly or by necessary implication hold that the plaintiff's freedom from fault is a jury question:

Van Horn v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 109.

Wright v. *South Counties Gas Co.*, 102 Cal. App. 656, 664.

Cantley v. *M.K.T. Railroad Co.*, 353 Mo. 605.

Graham v. *Badger*, 164 Mass. 42, 48.

Rayburn v. *Pennsylvania R. Co.*, 76 F. (2d) 505, 506.

Doughnut Machine Corp. v. *Bibbey*, 65 F. (2d) 635 (1st Cir.).

It will be noted that the last case cited, *Doughnut Machine Corp.* v. *Bibbey*, was decided in the first appellate district in 1933, Justices Bingham, Wilson and Anderson sitting. Apparently the present court intended to overrule

its own precedent, wherein the question of plaintiff's negligence was left to the jury, while still permitting application of the doctrine of *res ipsa*. The present court could not have missed it, because it was cited in the plaintiff's brief in the case at bar. The rule stated in our first specification of error cannot possibly be harmonized with the rule as stated in the Doughnut Machine case, which latter statement is good law, in our opinion, whereas the statement in the case at bar we believe to be utterly bad law.

In Prosser on Torts (1941 ed.) p. 330, it is said:

> "*Allied* to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as is that of the defendant, and res ipsa will not apply *until he has accounted for his own conduct*. But the requirement may easily be misunderstood. The plaintiff is seldom entirely static, and it is not necessary that he be completely inactive, *but merely that there be evidence removing the inference of his own responsibility*. If the evidence is sufficient to eliminate the plaintiff's contribution . . . the weight of modern authority is heavily in favor of the application of res ipsa loquitur to employees."

Moreover, the defendant pleaded and attempted (feebly) to prove that the deceased caused the derailment by throwing the switch before the trucks of the fourth car had cleared the switch points at "B." If the mere introduction of this evidence, which was submitted to but did not convince the jury, can be said to wipe out the application

of the doctrine of *res ipsa* then indeed in every case where a brakeman throws a switch properly and then gives a motion to pass over the switch points, and a derailment occurs, killing him instantly, under the ruling here attacked, his widow and children are automatically deprived of the benefits of the doctrine of *res ipsa;* and in derailment accidents (they occur almost daily) where there is no evidence of specific negligence on the part of the defendant railroad, the widow and children are deprived of the benefits of the Federal Employers' Liability Act.

The claim that Jesionowski signaled the train to back up before the fourth car in the forward movement had cleared the switch at "B" was purely an affirmative defense. The burden was on the defendant to prove this alleged fact by a fair preponderance of the evidence.

General Laws of Massachusetts (Ter. Ed.) c. 231, sec. 85.
O'Hara v. *Central R. Co.*, 183 Fed. 739.

The last sentence in the first specification is "The possible *causal actions* leading up to the fatal accident cannot be so separated." We are unable to find a recognizable legal thought or principle in this statement. Every day juries are engaged in negligence cases in separating the causal actions of a plaintiff from the causal actions of a defendant. That is the sole ground for their verdicts. And in the case at bar the prime function of the jury was to say whether the plaintiff or the defendant was to blame. The doctrine of *res ipsa* is simply a rule of evidence to assist the jury in making the necessary separation. If the doctrine is applicable, the jury may say that the defendant is guilty, or they may not. It is futile to attempt further argument as to the meaning of a legal statement which does not, to us, make sense.

THE SECOND SPECIFICATION OF ERROR (R. 122, 123).

The second specification of error covers the following excerpt from the Opinion of the Circuit Court:

> "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including *the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train,* the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back."

Here again, as in the first error, the assumption is made that the derailment could not have occurred at any point except the switch. In view of other probabilities relating to planks and the frog, greater probabilities as we read the record, this assumption, excluding the other probabilities, invalidates the whole of the opinion contained in the second specification of error. But there is even graver fault, for the opinion states that the "thing" which caused the injury was within the confines of a compound of several elements consisting in part of *conduct* on the part of the deceased. These conduct "things" are italicized above. The word "*res*" in the phrase "*res ipsa loquitur*" means

"thing," not conduct. From the very beginning of the rule in England to the present day in this Country cases involving the doctrine and its application have dealt with "things," inanimate objects, machines, mechanisms; including the inanimate adjuncts of railroads—engines, cars, boilers, tracks, roadbeds, rails, switch points, frogs. In *Francey* v. *Rutland R.R. Co.*, 224 N.Y. 482 (1918), often cited and sometimes, perhaps inaccurately, called a leading case, it is said at page 484:

> ". . . the inference that the accident was due to the negligence of the one having possession or control of the *article or thing* which caused the injury. The inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that *unless an explanation be given [by the defendant] the only fair and reasonable conclusion is that the accident was due to some omission of defendant's duty.*"

In other words, the *res* or "thing," as used in the doctrine, must be something that permits an inference against *the defendant only*, and not against the plaintiff. The plaintiff's conduct is a separate matter, relating in some cases to the control or proper handling of a "thing."

Of course the deceased controlled the movement of the train, and if he did so negligently, the plaintiff cannot recover. The jury has said, under "painstaking instructions," that the deceased was in no way to blame.

Control, in the doctrine, cannot mean control of one's self, but control of a thing; and certainly a train movement is not a "thing."

Consider the situation if the law enunciated by the appellate court is sound. Would it not be this, that every time a brakeman gives a signal which is followed by a derail-

ment, the precise cause of which is not ascertainable, he loses the advantage of the doctrine of *res ipsa loquitur?*

THE THIRD SPECIFICATION OF ERROR (R. 123).

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a *set of facts* wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of res ipsa loquitur."

This statement again disregards the verdict, the finding that Jesionowski was without fault. It substitutes a judicial dictum that Jesionowski could have been at fault. It denies the existence of a fact legally established by the proper fact-finding body.

The nub of the error here is the statement that the jury "must make that determination out of a set of facts wherein either one or both of the actors may have been at fault." This is clearly a false premise. If our argument that the verdict exonerated Jesionowski from blame is sound, there was only one issue left: Was the defendant negligent?

The Switch Points, Planks and Frog.

The only witness called by plaintiff was the defendant's locomotive engineer, one Whitney. He had been in defendant's employ for forty-five years (R. 10). He testified that switch points are those parts of the ends of the rail which will move when a switch is thrown to allow an opening into one track or another. The switch points are connected together by two rods, and a third rod connects the

rails to the switch itself (R. 16, 17). They were steel rails, about 7 or 8 feet long, tapering to a point at the place of contact with the other rails. (Parenthetically, it appeared later, by accurate measurements, that these points were 15 feet long (R. 38, 39).) He further testified that the accident happened at 5.30 on the morning of July 1, 1944, but that the sun had not yet come up (R. 10). (At the trial it was treated as a matter of common knowledge that the sun rose at 5.07 a.m. on July 1. The scene of the accident is near the seashore. No intervening elevations prevented the sun having its natural effect as soon as it rose at the sea horizon. The scene of the accident is about 8 miles from Boston to the west, and 8 miles from Salem to the east. Noel, defendant's wreckmaster, who lived in Lynn, less than 3 miles from the scene, did not reach it until between 7 and 7.15 a.m. (R. 49, 50). Sweeney, defendant's trainmaster, lived in Salem and reached the scene about 6.20 a.m. (R. 62). Flynn, defendant's assistant division engineer, lived in Belmont, a near suburb of Boston, and reached the scene about 7.30 a.m. (R. 72). Brady, defendant's section foreman, lived in West Lynn, where the derailment occurred. He arrived at the scene about 6.50 or 6.55 a.m. (R. 91, 92). Casey, defendant's track supervisor, lived in Salem. He arrived at the scene about 7.10 a.m. (R. 93, 94). Whitney, the engineer, testified that he *saw* "planks, splinters, flying . . . and there was a derailment." From this evidence and the fact that part of the wreck blocked a busy main line, the jury probably found that the derailment happened considerably later than 5.30 a.m.; that it was broad daylight when Jesionowski threw the switch, and that the signals were *not* given by lantern.)

While it is undisputed that the switch was properly thrown, nevertheless it was open to the jury to find, under the doctrine of *res ipsa loquitur*, that there was something wrong with the connecting rods, or the switch points, or

other switch mechanisms, which caused the derailment. The jury was not required by law to believe the defendant's explanation as to any "things" within the locus of the derailment.

But the opinion of the Circuit Court utterly ignores several important circumstances accompanying the derailment:

Whitney "saw planks and splinters flying first . . . and it was a derailment and I immediately stopped" (R. 13). He further testified that he had backed up 120 feet and *then* saw planks flying (R. 14). It is clear that Whitney, the only eyewitness, neither saw nor heard nor felt anything unusual in the running of the train until he had backed up 120 feet. Then he saw the planks and stopped. He later noticed these planks between the rails under the car (R. 18). The speed of the train was 5 miles per hour (R. 14). The train went 15 feet after Whitney saw the planks (R. 29). The distance from the switch to the frog was 75½ feet. Flynn testified that there were marks on top of the rail *69 feet east* of the switch. They began at that point. "They were dents, traces of a wheel that had cut into the top." Having in mind that the train went 120 feet before the engineer saw the planks and the marks on the top of the rail, facts testified to by defendant's own employees, two rational conclusions were left open for the jury: (1) that the fourth car, in the forward movement preparatory to backing into the siding, *must* have cleared the switch points by at least 30 feet before Jesionowski gave the back-up signal; and (2) that it was more probable, or at least as probable, that the derailment occurred at or near the frog by reason of planks between the rails or a defective condition of the frog or flanges (not infrequently the cause of derailments) and this conclusion is strengthened by the uncontradicted testimony that Jesionowski's body lay under the truck of the third car from the engine.

The engineer, Whitney, testified that the frog was a spring frog opened up by flanges of car wheels to allow a train to cross over the rails of one track onto the rails of another; that after the cross-over is completed, the frog closes automatically; and that if (by reason of defective flanges or a defect in the frog mechanism) "the frog does not open when touched by a flange," the result would be "probably a derailment" (R. 19, 20).

None of the important things referred to above were given any consideration by the Circuit Court. Only the "thing" over which Jesionowski had a temporary user control (which had ended before the derailment occurred) was referred to by the court as basis for its opinion. The exclusion of these other matters, the planks, the frog and the flanges, from the circumstances surrounding the accident clearly constitutes fatal error on the part of the appellate court.

Conclusion.

The plaintiff ought to have her writ because—

1. If the Circuit Court erred as claimed in plaintiff's specification of errors, these errors, if allowed to stand, destroy the very foundation of plaintiff's right to a verdict. If the errors are corrected upon the principles expounded in petitioner's accompanying brief, or for any other reason, the record and the law sustain the verdict.

2. "The law relating to res ipsa loquitur is replete with conflict, confusion and doubt. There is division of opinion as to circumstances required for its application and still greater disagreement as to the effect to be given it." Professor Charles E. Carpenter, in University of Chicago Law Review, vol. 1, 1933, 1934, p. 519.

Counsel have spent many tedious hours in an effort to find a straight thread leading out of the labyrinth of conflicting judicial statement to a point in the field of legal certitude. It need not be urged upon this court that the bar is confused. That is a matter of common knowledge to the bench. Counsel have failed to find any analysis of the doctrine of *res ipsa loquitur* by the Supreme Court of the United States since 1913 (*Sweeney* v. *Erving*, 228 U.S. 233). And that decision does not help us as to the solution of the problems raised by the opinion of the Circuit Court in the case at bar. The law, it is submitted, needs clarification by the Supreme Court of the land.

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